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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 89

THE UNITED STATES OF AMERICA,
Appellant,

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

STATEMENT OF THOMPSON'S DAIRY, INC., OPPOSING JURISDICTION

RAYMOND SPARKS,
W. V. T. JUSTIS,
Counsel for Appellee.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1948

Criminal Action

No. 294-48

UNITED STATES OF AMERICA

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

STATEMENT IN OPPOSITION TO JURISDICTION ON BEHALF OF DEFENDANT, THOMPSON'S DAIRY INC.

Comes now Thompson's Dairy, Inc., by its attorneys, and, pursuant to Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States, submits the following statement disclosing matter or ground making against the jurisdiction of the Supreme Court in the instant case.

The United States attempts to appeal, under the Criminal Appeals Act (18 U. S. C. A. Sec. 682) from an order of the District Court of the United States for the District of Columbia dismissing an indictment founded on Section 3 of the Sherman Anti-Trust Act.

Motions to dismiss the indictment were granted by the court below on the ground that the indictment does not set forth facts sufficient to charge a crime. The oral opinion of the court below concerning the action taken by it on the motions to dismiss reads as follows:

"Opinion of Court

Keech, J.: The motion to dismiss is in two parts; one, that it is duplicitous, and the other that the indictment is bad in substance.

The Court holds that the indictment is not duplicitous.

As to the second ground, namely, that this indictment does not charge a crime, the Court grants the motion to dismiss, believing that there has been a failure to set forth sufficient facts.

In doing this, I am not holding that the Sherman Act would not under any circumstances be applicable to a case involving a cooperative. I recognize and subscribe—as I must—to the determination in the *Borden* case, which holds that cooperatives are not exempt from the Sherman Act. I merely hold that the indictment in this case does not set forth sufficient facts to constitute a conspiracy in violation of Sec. 3 of the Sherman Act, in the view that I take of that Act and other Acts referred to in argument and judicial precedents presented.

Mr. Winn: Exception. That there are not adequate facts pleaded to make an offense.

Mr. Seal: That goes to all the defendants?

The Court: Yes, sir."

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The order entered by the court below on the motions to dismiss reads as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Criminal No. 294-48

UNITED STATES

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL., Defendants

Filed April 27, 1948. Harry M. Hull, Clerk

Order Dismissing Indictment

Upon consideration of the motions of the defendants, Simpson Brothers, Inc., and B. B. Derrick, respectively, to dismiss the indictment in the above entitled cause,

It is this 27th day of April, A. D. 1948,

ORDERED, That the motion of Simpson Brothers, Inc., to dismiss the indictment be and the same is hereby granted, and,

IT IS FURTHER ORDERED, That the motion of the defendant B. B. Derrick to dismiss the indictment be and the same is hereby granted, and

IT IS FURTHER ORDERED, That upon consideration of the Court's motion, the indictment in the above-entitled cause be and the same is hereby dismissed as to all remaining defendants.

By the Court.

(S.) R. B. KEECH,
Associate Justice."

The oral opinion shows that the court below did not predicate its dismissal of the indictment in this case solely on the construction of a statute. It follows, accordingly, that the Supreme Court has no jurisdiction over the instant appeal. Under the Criminal Appeals statute, the Supreme Court

has jurisdiction over a direct appeal from an order dismissing an indictment only in the event that the decision is predicated solely on the construction of a statute. *U. S.* v. *Borden*, 308 U. S. 188, 193. If the decision is, even "in part at least", based "on the inadequacy of the allegations of the indictment" to charge an offense, the ruling is predicated on a "matter of pleading" and the "correctness • • • [of the ruling] cannot under the statute be reviewed • • • on direct appeal from the district court." *U. S.* v. *Swift*, 318 U. S. 442, 444.

The only basis given by the court below for its dismissal of the indictment was contained in its oral opinion. The order entered by the District Court merely stated that the motion to dismiss had been granted. Looking at the oral opinion, it appears that the court placed its dismissal of the indictment on the ground, twice stated, that the indictment failed to set forth sufficient facts. Thus, the court said: "there has been a failure to set forth sufficient facts", and, again, "the indictment in this case does not set forth sufficient facts to constitute a conspiracy in violation of Section 3 of the Sherman Act, in the view that I take of that Act and other Acts referred to in argument and judicial precedents presented." Counsel for the United States, in stating his exception, construed the ruling to be "that there are not adequate facts pleaded to make an offense."

Therefore, it seems plain that the ruling of the District Court that the indictment in the instant case fails to set forth sufficient facts to make out a conspiracy is, within the doctrine of the *Swift* case, *supra*, a ruling based "in part at least" on the inadequacy of the indictment as a pleading. From this it follows, we think, that the Supreme Court does not have jurisdiction over the instant appeal.

The reporter's transcript of the arguments supporting the motions to dismiss in this case has not been available to

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the defendants, with the exception of the one page setting forth the opinion of the lower court quoted in the beginning of this Statement, and will not be available until sometime after the date upon which this defendant is required to file a statement in opposition to jurisdiction. This defendant is, therefore, unable at this time to point out the portions of the argument of counsel in the lower court relating to grounds other than the construction of the Sherman Act and other statutes, although such other grounds were urged upon the lower court in support of the motions to dismiss the indictment.

It is respectfully requested that this defendant be permitted to file a supplementary statement in opposition when the transcript of the argument in the lower court is made available to it, if this Court be of the view that the transcript of the argument is essential to a decision as to jurisdiction.

Respectfully submitted,

RAYMOND SPARKS,
W. V. T. JUSTIS,
Attorneys for Defendant,
Thompson's Dairy, Inc.